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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-503

EDWARD C. BELL,
Petitioner,

v.

RICHARD D. HONGISTO, Sheriff of the City and County of San Francisco, State of California,
Respondent.

Petitioner's Reply Memorandum

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Respondent's opposition to the instant petition for a writ of certiorari (hereinafter "RO") is helpful to petitioner in at least three ways. *First*, it confirms petitioner's statement of the facts and his representations concerning the state of the record. *Second*, it presents arguments which, as we shall show in this reply, are patently without merit. *Third*, it fails entirely to address two crucial points contained in the petition, a failure which we believe is of considerable significance. In this reply, petitioner will briefly speak to the arguments advanced by respondent, and will point out the significance of what respondent has left unsaid.

Respondent first discusses the difference between prosecuting contempts under California Penal Code § 166 and under California Code of Civil Procedure § 1209. He asserts that Section 166 contempts, which are denominated misdemeanors, (1) involve

conduct which is more serious in nature than that involved in Section 1209 contempts, and (2) subject the contemnor to more severe penalties than those which may be imposed under Section 1209. Since Section 1209 contempt is said to be "a petty offense at most" (RO at 11), respondent contends that less advantageous procedures may be afforded a Section 1209 contemnor.

However, a comparison of the conduct defined as contemptuous by Penal Code § 166 and by Code of Civil Procedure § 1209 shows that the two are strikingly similar. And although the maximum punishment provided by Section 166 is inded more severe than that provided by Section 1209, many other misdemeanors established by California law carry penalties which are far *lighter* than those permitted by Section 1209.[1] Since every defenda..t convicted of such a misdemeanor has an absolute right to an appeal and to bail pending appeal, it is no help to respondent, for equal protection purposes, that Section 166 allows a more severe penalty.

In addition, respondent's effort to dispense with fundamental procedural safeguards in a criminal case by characterizing the crime as a "petty offense" has often been rejected by this Court in recent years, see, e.g., *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Williams v. Oklahoma*, 395 U.S. 458 (1969), especially where, as here, the defendant is subject to losing a professional license "because of a conviction which he is unable to appeal." *Mayer v. City of Chicago, supra*, 404 U.S. at 197. As Mr. Justice Powell put it in *Argersinger*:

> "The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplor-

1. For example, the maximum punishment which may be imposed for a violation of California Fish & Game Code § 8686 is a fine of $100. See Fish & Game Code § 12012. And various misdemeanors defined in specified divisions of the California Vehicle Code are punishable by a fine of $50 or 5 days in jail. See California Vehicle Code § 42001(b). These particular misdemeanors are merely illustrative of many others which also carry lighter sentences than CCP § 1209.

> able conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty'.
> "Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attack to a drunken driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail." 407 U.S. at 47-48 (Powell, J., concurring).

Here, as in *Mayer v. City of Chicago, supra*, petitioner's contempt conviction, imposed for his wilful disobedience of an order of the court, subjects him to the possible loss of his license to practice his profession. See California Business and Professions Code § 6103. Thus the absolute discretion of a contemned judge to prosecute an accused contemnor for the same act either under Penal Code § 166 (with the attendant right to an appeal) or under Code of Civil Procedure § 1209 (without any such right) constitutes yet another way in which the California statutory scheme permits a trial judge effectively to isolate his action from any judicial scrutiny.

Next, respondent argues that Section 1209 contemnors "suffer no real injury" since the *scope* of appellate review by habeas corpus is essentially the same as the scope of review by way of appeal (RO at 11-12). Such a statement is, on its face, a plain non sequitur, since petitioner's complaint goes not to the *scope* of review, but rather to the fact that he had no time in which to adequately prepare—and the courts had no time in which to adequately consider—the merits of his case. In other words, of what use to petitioner was a broad *scope* of review when the court of appeal denied his petition, which he had to prepare in an hour, approximately ten minutes after it was filed?

Respondent next argues that petitioner is not a "criminal" contemnor "since petitioner was not convicted of a criminal mis-

demeanor" (RO at 14 n.3). But even the court below, in upholding respondent's position, flatly rejected any distinction based upon such discredited labels. Although conceding that petitioner's offense was not criminal "under the statutory terminology," it was criminal in nature "because the purpose of the contempt sanction in this case was punitive rather than compensatory or coercive" (App. A to Pet. at 9). Such a refusal to elevate form over substance is, of course, in accord with this Court's decisions over the past decade. See, e.g., *Mayer v. City of Chicago, supra*; *Williams v. Oklahoma, supra*; *In re Gault*, 387 U.S. 27 (1967).

Respondent also appears to argue that in opposing California's statutory scheme petitioner may not invoke the rights of his clients to receive a vigorous defense from their attorney. However, in this case, as in *Procunier v. Martinez*, 416 U.S. 396 (1974), the rights of petitioner and his clients are "inextricably meshed," inasmuch as a lawyer's failure to vigorously advance an argument which he believes to be correct—due to his fear of receiving an unreviewable contempt conviction—necessarily harms his client even *more* than it does the lawyer. Moreover, the fact that there would be no record made of such an event (i.e., the lawyer's *failure* to commit the potentially contemptuous act) means that there is no effective way in which such criminal defendants *could* litigate the issue on their own. In such situations, this Court has traditionally permitted litigants properly before it to invoke the rights of others to whom they are closely related, since "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953); see *United States v. Raines*, 362 U.S. 17, 22-24 (1960).

Respondent also argues that the denial of an appeal to all Section 1209 contemnors is "rationally related" to the "preserva-

tion of order, administrative regularity, and the very dignity of the court" because (1) immediate punishment has a far greater deterrent effect, and (2) a trial court would be "less hesitant to mete out necessary punishment knowing that a review will follow rapidly from its decision" (RO at 17). Yet respondent nowhere explains why either of these supposed virtues does not equally apply to Section 166 contempts or indeed to all crimes, of whatever nature. And when respondent finally becomes at all specific it turns out that the trial judge "*had* to act quickly" only because a panel of prospective jurors was waiting in the courtroom (RO at 18) (emphasis in original).

Respondent's principal argument with respect to due process essentially begs the very question there at issue. Thus respondent argues that under *In re Berry*, 68 Cal. 2d 137 (1968), petitioner was entitled to disobey the trial court's order to go to trial only if his legal position regarding the disqualification motion was correct, and that the California appellate courts "held that there was no error in the order finding petitioner in contempt" (RO at 22). However, this "holding" came initially from the court of appeal after a ten minute consideration of a petition which petitioner had prepared in one hour; and later from the California Supreme Court after a four hour consideration of a petition which petitioner had prepared overnight. Since what is at issue in this case is the very adequacy (and hence the validity) of such an appellate "review," it is no answer to say that petitioner's legal position is incorrect because the appellate courts of California have said so.

Finally, respondent attempts to distinguish two decisions of this Court, relied upon by petitioner, on their particular facts. See *Taylor v. Hayes*, ... U.S. ....., 94 S. Ct. 2697 (1974); *In re Green*, 369 U.S. 689 (1962). Of course the facts of both cases are different from those of the case at bar. Yet *Taylor* clearly

stands for the broader proposition for which it was cited by petitioner, i.e., that a contemnor must receive at least one *meaningful* hearing on the merits before a contempt conviction may be validly imposed. Likewise, *Green* clearly holds that where, as here, the validity of a contemnor's conviction depends upon whether the underlying order which he disobeyed is correct as a matter of law, it is a due process violation to impose a conviction without first giving the contemnor an adequate opportunity to show that the order was beyond the court's jurisdiction.

But it is equally important to note the two points which respondent does not even attempt to refute. The first is related to the fact that the correctness *vel non* of petitioner's contempt conviction turns, under California law, entirely upon whether or not petitioner's disqualification petition was timely filed, since if it was then the trial court lost jurisdiction to issue any further orders, including an order adjudging petitioner in contempt of court.[2] For this reason, petitioner briefed the disqualification issue at length in the District Court; included this briefing in the record which was before the court below (CT 143-63); and has lodged a certified copy of this portion of the record with the Clerk of this Court in support of the instant petition. His purpose, of course, is to show that where the validity of a contempt conviction turns upon a legal argument of complexity (and of first impression), (1) it is a due process violation to deny him the opportunity to prepare and present his argument prior to conviction, and (2) it is an equal protection violation to require him to prepare and

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2. Respondent is simply incorrect, as a matter of law, in stating that "[a] motion to disqualify a judge for bias cannot, of course, oust the court from its jurisdiction to cite for contempt" (RO at 21, n.5). For the cases make it clear that a *valid* disqualification motion has precisely that effect. See *Oksner v. Superior Court*, 229 Cal. App. 2d 672, 40 Cal. Rptr. 621, 633 (1964); *Woodman v. Selvage*, 263 Cal. App. 2d 390, 69 Cal. Rptr. 687, 691 (1968); *In re Cuneo's Estate*, 214 Cal. App. 2d 381, 29 Cal. Rptr. 497, 499 (1963).

present such an argument in one hour for a ten minute consideration by the appellate court, when all other criminal defendants have an absolute right to a full briefing of the issues and to a considered review by the appellate court. Yet never once, in the District Court, in the court below or in this Court, has respondent ever attempted to show either that petitioner's argument on this point is without substance or that it is one which he could have adequately prepared and presented within the time permitted him by the trial or appellate courts in which he appeared.

The second point on which respondent is silent involves the correct application of the "rational relationship" test to the facts of the case at bar. As the court below acknowledged, it is not enough that the denial of certain rights logically promotes some legitimate state interest if, at the same time, the denial tends "to impair other, more important goals" (App. A to Pet. at 13-14, n.12). Accordingly, petitioner (at pages 15-17 of the petition) discussed a number of reasons why the California statutory scheme here under attack not only impairs other important interests, but does so in a positively *irrational* manner. Yet this Court will search respondent's opposition in vain to find a reasoned reply to any of these considerations.

* * * * * *

This case presents a problem which goes to the very heart of the adversary system of criminal justice: the power of a trial judge to impose and immediately execute a contempt conviction which he, in his absolute discretion, is then able to effectively insulate from appellate review. Nor is this problem limited to California since, as respondent correctly points out, similar procedures permitting summary review of contempt convictions are "followed in a substantial number of jurisdictions today" (RO at 11); see Chase, *Contempt Adjudication or Conviction as Sub-*

ject to Review Other Than By Appeal or Writ of Error, 33 ALR 3d 589. Where such a serious defect in our criminal justice system exists on a nationwide basis, it would seem especially appropriate for this Court to afford the matter plenary consideration by granting the instant petition for a writ of certiorari.

Respectfully submitted,

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